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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

23 Cr. 10 (RMB)

5 AVRAHAM EISENBERG,

6 Defendant.

Conference

7 -----x

8 New York, N.Y.

9 June 14, 2023

10:15 a.m.

10 Before:

11 HON. RICHARD M. BERMAN,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS

15 United States Attorney for the
Southern District of New York

16 BY: THOMAS S. BURNETT

Assistant United States Attorney

17 WAYMAKER LLP

18 Attorneys for Defendant

19 BY: BRIAN E. KLEIN

ASHLEY MARTABANO

-and-

20 TALKIN, MUCCIGROSSO & ROBERTS

21 BY: SANFORD N. TALKIN

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(The Court and parties appearing by videoconference)

THE COURT: Good morning, everybody.

Mr. Eisenberg, good to see you.

This matter was scheduled today as a pretrial conference. Mr. Eisenberg is obviously detained, on consent I might add.

Just by way of background, the last conference that we held, that everybody was present, was May 8, 2023. And during that conference, the government advised the Court of the status of discovery produced so far to the defense. We sought to have today's conference yesterday, but for some reason the facility where he is, Essex, was unable to locate Mr. Eisenberg for purposes of the hearing. But here we are today.

Mr. Eisenberg was arrested on a complaint in Puerto Rico on December 26, 2022. He arrived in the Southern District of New York on February 2, 2023, at which time he was presented before Magistrate Judge Jennifer Willis and detained on consent without prejudice.

He was indicted on January 9, 2023. There is a three-count indictment which includes these counts: One, commodities fraud; two, commodities manipulation; and three, wire fraud. These are only allegations at this time that are contained in the indictment.

I think we will jump to the parties, defense counsel and the government. And perhaps I will start with the

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1 government counsel to tell us where we are in terms of
2 discovery, etc. and any other issues that you're aware of.

3 MR. BURNETT: Yes. Thank you, your Honor.

4 So, in terms of discovery, the government has made
5 available to defense all of the Rule 16 materials that are in
6 the government's possession, custody and control. The one
7 outstanding item on discovery is the government obtained a
8 search warrant for some of Mr. Eisenberg's phones and one of
9 his computers. The images or extractions from those devices
10 have been available to defense at the FBI building because they
11 have some contraband on the devices. The government up until
12 yesterday had not been able to execute the search warrant; and
13 when I say execute the warrant, I mean review the data
14 ourselves because we were completing a privilege review. My
15 understanding is that the privilege review on I think two of
16 the three devices is now complete. So the government will be
17 executing the search warrant, which will result in the
18 government producing a responsive set of materials to the
19 defense. That won't be anything that they don't already have
20 access to. It will just be a subset of what they already have
21 access to that we have identified as responsive to the warrant.
22 So that is the last remaining discovery-related issue from the
23 government's perspective.

24 In terms of the plan for today, the defense and I have
25 been talking regularly. We think it probably makes sense at

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1 this point to set a trial schedule and then the parties, once
2 there is a trial schedule set, will confer and submit a
3 proposed schedule for briefing on a motion to dismiss and
4 potentially a motion to suppress. I think we can get that
5 proposed schedule in fairly quickly, within a week or so after
6 today, but we figured it makes most sense to have a trial date
7 set first and then we can figure out the schedule based on that
8 date.

9 THE COURT: So we have reviewed our calendar here, and
10 we were thinking about April 2, 2024, for trial. I think maybe
11 that information has been shared to counsel, or some of you,
12 and I think that that date was satisfactory to you. But let's
13 hear from defense counsel or any other issues that you want to
14 address.

15 MR. KLEIN: Yes, your Honor. This is Brian Klein.

16 We were actually hoping for a trial in September and
17 October. We had heard that that date was not available with
18 your Honor's calendar. We had heard a December date was
19 available and we thought that might work. Mr. Talkin has one
20 thing he wanted to raise. Is there no chance in the Court's
21 calendar of a December date?

22 THE COURT: I will go over it again with Christine. I
23 suppose, although I don't know if this is going to help you for
24 planning, if something else were to fall out that's already on
25 the calendar, we would be happy to give you that time.

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1 Hold on. I can give you a preliminary response even
2 now, but I am not sure it's going to work.

3 How about December 4?

4 MR. KLEIN: Your Honor, this is available for the
5 defense. Mr. Talkin had one point he wanted to raise because
6 we were trying to get to trial sooner.

7 Mr. Talkin.

8 THE COURT: We just got five months sooner.

9 MR. KLEIN: I know. Thank you, your Honor.

10 MS. TALKIN: Your Honor, the issue I have is I have
11 another trial scheduled for that exact date in Eastern
12 District. However, that defendant is out. So I would ask
13 that, if it's okay with the Court, we take that December
14 date -- and it's okay with the government -- we take that date
15 and give me one week just to move that trial. If it just so
16 happens I can't move that trial, I will inform the Court and we
17 know we have that April possibility. But if that's an
18 acceptable procedure, I will ask to do that. I should be able
19 to move that trial, but I can't tell you 100 percent as we sit
20 here. I have already put the wheels in motion, but I can't
21 confirm for you yet.

22 THE COURT: So a couple of things.

23 First, let's hear from the government if the
24 government is ready to go to trial on December 4. I am happy
25 to do it.

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1 MR. BURNETT: Thank you, your Honor.

2 I have another trial that finishes I think in early
3 November. So it's a little bit of a tight turnaround, but if
4 it works for everyone else, we will be ready.

5 THE COURT: That takes care of that.

6 I don't want to adjourn today until we get some more
7 dates in here. So December 4 is not as far off as we might
8 think. So I wouldn't mind at least concluding the early
9 motions. When do you think you can have that?

10 First of all, defense counsel, are you planning to
11 make one or more pretrial motions? I am not talking about
12 motions *in limine* now and the motions in anticipation of the
13 jury trial. I am talking about the motion to dismiss or
14 whatever you have in mind. Let me hear about that.

15 MR. KLEIN: Yes, your Honor. We are contemplating and
16 anticipating a motion to suppress. We have talked to the
17 government about that. And we would anticipate filing that by
18 mid-July. We also anticipate filing a number of motions to
19 dismiss. It's still early, your Honor, to know what those
20 might look like, but we have started to work on those and
21 researching them, so we anticipate a few of those.

22 We wanted to talk to Mr. Burnett about his schedule
23 because he has that trial. We don't want to jam him up, and
24 obviously don't want to jam the Court up, of course.

25 THE COURT: It would be easier for me to have one

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1 omnibus motion, a motion to dismiss, whatever else you have
2 got, put them all in one motion, and you tell me what is the
3 earliest you can have that motion presented.

4 MR. KLEIN: I think that would be sometime in July. I
5 want to talk with Mr. Talkin and the government because there
6 are some scheduling issues for both of us there, but I think we
7 can have that sometime in July or August.

8 Your Honor, I am not trying to not pick a date now.

9 THE COURT: I get it.

10 So let's say it is July. And then let's say, for
11 whatever reason, the motions don't succeed and we are going
12 forward to a jury trial. So then we need, as you know,
13 pretrial submissions, which include motions *in limine*, joint
14 jury instructions, joint verdict sheet, joint proposed voir
15 dire. So we need all of that. And then we need time for a
16 government response. So those are the two sets of motions.

17 I think we could accommodate, if you all can, mid-July
18 would be better than August. I am not going to force you now
19 with dates but just the process. So there would be one omnibus
20 motion and response from the government and reply from the
21 defense. And then in the event that we are still going to
22 trial, I am going to need dates from all of you, again, for
23 motions *in limine*, joint jury instruction, joint verdict sheet,
24 joint proposed voir dire, when those would be submitted. And
25 then we would need a government response to those particular

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1 motions *in limine*. Then we also need a final pretrial
2 conference before the trial.

3 So, as I say, it seems far off but not really, and you
4 all know this actually as well or better than I do. So if you
5 could jointly submit a proposal that embraces all of those
6 steps pretrial, I will take a look. If you could submit that
7 jointly within the next week, and hopefully then we will be
8 ready to advise the public as to what the schedule is.

9 How does that sound?

10 MR. KLEIN: Your Honor, that sounds great and we
11 appreciate it. Could we have until Thursday because Monday is
12 a holiday.

13 THE COURT: No problem. So Thursday is -- do you
14 happen to have that date handy?

15 MR. KLEIN: I think it's the 22nd.

16 THE COURT: That's fine.

17 MR. KLEIN: For the pretrial conference, do you
18 usually like it one week or two weeks before? Is there a date
19 you usually like to have that just so we know?

20 THE COURT: I guess the earlier the better. I am
21 pretty flexible about it. If I had my druthers, two weeks
22 would be great. We could do it in one week if we had to. So
23 if you could think about a two-week notice, I would appreciate
24 that.

25 MR. KLEIN: Yes, your Honor.

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1 THE COURT: So I think that covers it.

2 So I will look, first and foremost, to the 22nd for an
3 on-consent schedule that takes us from today through trial.

4 Do you anticipate or have you thought about it -- you
5 may not be able to answer this yet -- how long a trial this
6 might be?

7 MR. KLEIN: We have talked about it with the
8 government, your Honor. I think they can tell you their
9 estimate for their case and we can go from there.

10 THE COURT: Let's hear from the government.

11 MR. BURNETT: I think, your Honor, that the
12 government's case would be about a week and a half.

13 THE COURT: So, of course, everybody is concerned
14 about the Christmas holiday, etc., as the jurors would be also,
15 but that ought to work. If we set aside, let's say, three
16 weeks, I am sure that would be more than enough based on what
17 you're saying. Offhand, do you think that's right?

18 MR. KLEIN: Yes, your Honor, for the defense.

19 MR. BURNETT: Same for the government, your Honor.

20 THE COURT: So that is good progress then.

21 So we have two things left. The first is for me to
22 ask you if you have any other issues that we didn't get to
23 today, if you have any. And second, if there is a speedy trial
24 issue or application which takes us to December 4.

25 MR. BURNETT: Thank you, your Honor.

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1 For the government, it's just the speedy trial
2 application. And on that score, the government would move to
3 exclude time to December 4 so the parties can discuss, prepare,
4 and file motions and then prepare for trial.

5 THE COURT: I am inclined to grant that motion, unless
6 there is some objection from the defense, to exclude time to
7 and including December 4, 2023.

8 MR. KLEIN: We do not object, your Honor.

9 THE COURT: Did defense have anything further?

10 MR. KLEIN: Nothing, your Honor. We just want to
11 thank you so much for accommodating the videoconference today.
12 It actually is incredibly helpful for us and our client. So we
13 just want to express appreciation for that.

14 THE COURT: It's our pleasure to do it. And Christine
15 and Ashley arranged it so we are happy to accommodate you when
16 we can.

17 I think then that's it. I will review your letter and
18 then put out an order with the dates that we have all agreed
19 on. Okay?

20 MR. KLEIN: Thank you very much.

21 MR. BURNETT: Thank you.

22 MR. KLEIN: Your Honor, is it possible if Christine or
23 Ashley could let us talk to Mr. Eisenberg for a minute
24 afterwards in a separate room?

25 THE COURT: I will let Ashley arrange that.

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1 Ashley, can you do that?

2 THE CLERK: Yes. I will set up a breakout room.

3 THE COURT: Mr. Eisenberg, you stay on and we will
4 make it possible for you to talk to defense counsel.

5 THE DEFENDANT: Thank you.

6 THE COURT: Otherwise I am going to sign off.

7 Good to talk to you all. Thanks so much.

8 (Adjourned)

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